

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

SANTOS MARTINEZ,

Plaintiff,

V.

**UNITED STATES OF AMERICA,**

**Defendant.**

**CIVIL NO. 04-1970 (DRD)**

## **REPORT AND RECOMMENDATION**

Before the Court are the United States' motion to dismiss (Docket No. 11) and plaintiff, Santos Martinez's ("Martinez") opposition thereto (Docket No. 18). Martinez seeks compensatory and monetary damages for loss of income and mental anguish amounting to \$300,000.00. *Complaint*, p. 3 (Docket No. 1). Defendant moves to dismiss Martinez's complaint for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

## I. Factual Background

\_\_\_\_ On December 26, 2001, Martinez contracted with defendant<sup>1</sup> “to provide all necessary labor, materials, supplies and equipment to instruct scuba diving classes for a one year period, renewable yearly”. *Complaint*, p.2 ¶ 5 (Docket No. 1). Pursuant to this agreement, Martinez would retain seventy percent (70%) of the prices charged to students per course, thus leaving defendant with the remaining thirty percent (30%).

The alleged damages sprung during the second year of the above mentioned contract. During this period, Martinez alleges he was “lead to believe that the original agreement was amended to include a modification allowing the sale of Scuba Diving Gear”. *Complaint*, p.2 ¶ 6 (Docket No. 1). Martinez alleges that defendants’ employees lead him to believe “that he had valid contract rights

<sup>1</sup> Martínez entered into the agreement with the non-appropriated funds (NAF) contracting branch for the Department of the Army.

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under which he invested and earned gross profits of approximately \$54,000.00 for a period of eight months". Complaint, p.3 ¶ 13 (Docket No. 1). During an eight (8) month period, under this alleged modification to the original contract, Martinez alleges to have payed defendant 25% of all profits obtained. *Opposition to Motion to Dismiss*, p.3 ¶ 8. (Docket No. 18). Subsequently, on September 20, 2003 Martinez was informed that the alleged modification to the original contract was invalid. As a result, Martinez alleges he was left with an unsold inventory of fifty thousand dollars (\$50,000.00). *Complaint*, p.2 ¶ 9 (Docket No. 1). Martinez claims that "as a proximate result of Defendants' acts and omissions he suffered loss of income and mental anguish amounting to \$300,000.00". *Complaint*, p.3 ¶ 14 (Docket No. 1).

11 **II. Standard of Review**

12 In a jurisdictional challenge, "the standard applied to a 12(b)(1) motion is similar to the  
 13 standard applied to a 12(b)(6) motion, namely, the court must take all of plaintiff's allegations as  
 14 true and must view them, along with reasonable inferences therefrom, in the light most favorable  
 15 to plaintiff." Pejepscot Indus. Park v. Maine Cent. R.R., 215 F.3d 195, 197 (1<sup>st</sup> Cir. 2000); see  
 16 Freiburger v. Emery Air Charter, Inc., 795 F.Supp. 253, 257 (N.D. Ill. 1992); Hart v. Mazur, 903  
 17 F.Supp. 277, 279 (D.R.I. 1995). However, once the challenge has been raised, the plaintiff carries  
 18 the burden of demonstrating the existence of the court's jurisdiction. See Puerto Rico Tel. V.  
 19 Telecom. Regulatory Bd., 189 F.3d 1, 1 (1<sup>st</sup> Cir. 1999).

20 When assessing whether dismissal is appropriate, "the trial court must accept as true the well-  
 21 pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the  
 22 plaintiff's favor, and determine whether the complaint, so read, limns facts sufficient to justify  
 23 recovery on any cognizable theory." La Chapelle v. berkshire Life Ins. Co., 142 F.3d 507, 508 (1<sup>st</sup>  
 24 Cir. 1998). But "[a]lthough this standard is diaphanous, it is not a virtual mirage." Berner v.  
 25 Delahanty, 129 F.3d 20,25 (1<sup>st</sup> Cir. 1997). In order to survive a motion to dismiss, "a complaint must  
 26 set forth 'factual allegations, either direct or inferential, respecting each material element necessary  
 27 to sustain recovery under some actionable legal theory.'" Id. When judging a complaint's  
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2 sufficiency, courts must “differentiate between well-pleaded facts, on the one hand, and ‘bald  
3 assertions, unsupportable conclusions, periphrastic circumlocution, and the like,’ on the other hand;  
4 the former must be credited, but the latter can safely be ignored.” LaChappelle, 142 F.3d at 508; see  
5 Rogan v. Menino, 175 F.3d 75, 77 (1<sup>st</sup> Cir. 1999). The reviewing court should “not accept a  
6 complainant’s unsupported conclusions or interpretations of law.” Wash. Legal Found. V. Mass. Bar  
7 Found., 993 F.2d 962, 971 (1<sup>st</sup> Cir. 1993).

8 **III. Legal Analysis**

9 A. The “Big” Tucker Act and The Court of Federal Claims

10 Claims against the United States that exceed \$10,000.00, founded upon the Constitution, a  
11 federal statute, or a regulation or contract, are within the sole jurisdiction of the Court of Federal  
12 Claims. Charles v. Rice, 28 F.3d 1312, 1312 (1<sup>st</sup> Cir. 1994). Martinez’s complaint alleges economic  
13 losses and mental anguish caused by the United States leading him to believe that he had “valid  
14 contract rights under which he invested and earned gross profits of approximately \$54,000.00 for  
15 a period of eight months”. (Docket No. 1). This Court cannot infer that the tortious actions are not  
16 in relation to the contract since plaintiff alleges that “his damages occurred when he was lead to  
17 believe that he had a valid modification to contract number NAFAC1-02-C-0002, and he used his  
18 savings to purchase inventory and he was allowed to sell scuba equipment after the Fort Buchanan  
19 Store waived its primacy to sell”. *Opposition to Motion to Dismiss*, p.5 ¶ 2 (Docket No. 18).

20 As per the complaint and opposition to motion to dismiss, plaintiff recognizes that the  
21 alleged tortious acts occurred while he allegedly was lead to believe that he had a modification to  
22 the original contract. Thus, claims founded upon alleged failure to perform explicit or implicit  
23 contractual obligations are not deemed “tort” claims under the Federal Tort Claims Act, but rather  
24 under the Tucker Act. See Helena Joint City-County Airport Bd. V. U.S., 256 F.Supp 792, 792  
25 (1966); Blanchard v. St. Paul Fire, 341 F.2d 351, 358 (5th Cir. 1965).

26 Considering the facts and allegations in light most favorable to Martinez, this Court cannot  
27 consider the alleged tortious acts to be separate from the original contract since they occurred during  
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2 the second year of a valid contract with defendant. Consequently, as indicated under the Tucker Act,  
 3 only the Court of Federal Claims has jurisdiction to adjudicate plaintiff's breach of contract claim.  
 4 See 28 U.S.C. § 1491<sup>2</sup>.

5 **IV. Conclusion**

6 \_\_\_\_\_ **WHEREFORE**, for the reasons stated herein, this Court must **GRANT** defendants' motion  
 7 to dismiss (Docket No. 11).

8 Under the provisions of 28 U.S.C. § 636 and Rule 72(d), Local Rules, District of Puerto  
 9 Rico, any party who objects to this report and recommendation must file a written objection thereto  
 10 with the Clerk of the Court within ten (10) days of the party's receipt of this report and  
 11 recommendation. The written objections must specifically identify the portion of the  
 12 recommendation, or report to which objection is made and the basis for such objections. Failure to  
 13 comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155  
 14 (1985), reh'g denied, 474 U.S. 1111 (1986); Davet v. Maccorone, 973 F.2d 22, 30-31 (1<sup>st</sup> Cir. 1992).

15 **SO RECOMMENDED**

16 In San Juan, Puerto Rico, this 22<sup>nd</sup> day of September, 2005

17 *St Gustavo A. Gelpi*  
 18 **GUSTAVO A. GELPI**  
 19 **United States Magistrate-Judge**

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 23       <sup>2</sup>28 U.S.C. §1491(a)(1) that "The United States Court of Federal Claims shall have  
 24 jurisdiction to render judgment upon any claim against the United States founded either upon the  
 25 Constitution, or any Act of Congress or any regulation of an executive department, or upon any  
 26 express or implied contract with the United States, or for liquidated or unliquidated damages in cases  
 27 not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army  
 28 and Air Force Exchange Service, Navy Exchanges, marine Corps Exchanges, Coast Guard  
 Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be  
 considered an express or implied contract with the United States".